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April 9, 1998

EX PARTE ORAL PRESENTATION FILED

VIA HAND DELIVERY

Magalie Roman Salas, Esq.
Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

Re: Oral Ex Parte Presentation
CC Docket No. 96-45
AAD/USB File No. 98-37

Dear Ms. Salas:

On Thursday, April 9, 1998, Kenneth Salomon and the undersigned, counsel for the Iowa Telecommunications and Technology Commission, met with Thomas Power of Chairman Kennard's office. During that meeting we discussed the attached materials, which were left with Mr. Power, and the implications of the cases described in those materials for this matter.

Pursuant to Section 1.1206(b) of the Commission's Rules, an original and one copy of this letter are being submitted to the Secretary's office and copies are being provided to Mr. Power by the close of the business day following the meeting. Please inform me if any questions should arise in connection with this filing.

Respectfully submitted,



J.G. Harrington

JGH/vll
Attachment

cc (w/o attach.): Thomas Power

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IOWA COMMUNICATIONS NETWORK
REQUEST FOR DETERMINATION OF CARRIER STATUS
CC DOCKET No. 96-45 ♦ AAD/USB FILE No. 98-37

The following is a list of examples outlining the criteria for being a common carrier as an entity which holds itself out indifferently to all *potential* customers for its particular services on standard terms and conditions. The Iowa Communications Network fits well within this framework because it makes services, including distance learning and telemedicine, available to all potential users of those services.

I. GENERAL PRINCIPLES

- 13 AM. JUR. 2D *Carriers* § 4 (1964); *Bowles v. Weiter*, 65 F. Supp. 359 (E.D. Ill. 1946).

“A common carrier has the right to determine what particular line of business he will follow and his obligation to carry is coextensive with, and limited by, his holding out as to the subjects of carriage. Thus, it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him. If he holds himself out as a carrier of a particular kind of freight generally, prepared for carriage in a particular way, he will be bound to carry only to the extent and in the manner proposed.”

- *National Ass'n of Regulatory Util. Comm'rs v. FCC*, 525 F.2d 630 (D.C. Cir. 1976), *cert denied*, 425 U.S. 992 (1976) (*NARUC I*).

Interpreting the meaning of “common carrier,” the District of Columbia Circuit concluded that an entity may be a common carrier even though the nature of the service rendered is sufficiently specialized as to be of possible use to only a fraction of the total population, and business may be turned away either because it is not of the type normally accepted or because the carrier’s capacity has been exhausted.

II. COMMON CARRIERS AND COMMON CARRIER SERVICES LIMITED BY STATUTE AND REGULATION

- The Communications Satellite Act of 1962 — 47 U.S.C. § 735 (1962).

Title III of the Communications Satellite Act (“Act”) authorizes the creation of a communications satellite corporation (“corporation”), subject to the provisions of the Act. The corporation was provided with limited authority to “plan, initiate, construct, own, manage, and operate itself . . . [as] a commercial *communications satellite system*.” Although only permitted by statute to provide satellite services, the corporation was deemed a common

carrier within the meaning of section 3(h) of the Communications Act of 1934. *See* 47 U.S.C. § 741 (1962).

- *In re Graphnet Systems, Inc.*, 73 F.C.C. 2d 283 (1979).

Electronic Computer Originated Mail (ECOM) service to be offered by U.S. Postal Service using Western Union services and facilities is common carrier offering where ECOM is a quasi-public offering for a for-profit service which affords the public an opportunity to transmit messages of its own design and choosing. Uncontroverted evidence that ECOM service was identical to the Western Union Mailgram offering in scope, service, operation and facilities also led the FCC to conclude that ECOM was a common carrier communications service subject to FCC jurisdiction – where Western Union had tariffed the electronic communications segment of Mailgram with the FCC in recognition that it is the type of common carrier communications service subject to the Communications Act. *See* 39 U.S.C. § 404 (1980) (Congress established the United States Postal Service pursuant to Title 39, furnishing it with the *limited* authority to provide for the collection, handling, transportation, delivery, forwarding, returning, and holding of mail, and for the disposition of undeliverable mail and to provide philatelic services.).

- The National Railroad Passenger Corporation (“Amtrak”) — 45 U.S.C. § 541 (1987).

Title III of the Rail Passenger Service Act created Amtrak for the purpose of providing intercity and commuter passenger rail service. Amtrak is defined as a common carrier of railroad transportation. *See* 49 U.S.C. §§ 24301(a)(1), 10102(6) (1997). Congress furnished Amtrak with the *limited authority* to operate and maintain facilities necessary for the provision of rail passenger transportation, the transportation of mail and express, and auto-ferry transportation. 49 U.S.C. § 24305 (1997).

- Applications of Telephone Common Carriers to Construct and/or Operate Cable Television Channel Facilities in Their Telephone Facilities — 47 C.F.R. §§ 63.54, 63.55 (1995).

Pursuant to 47 C.F.R. § 53.54(d)(3), the FCC authorized telephone companies to acquire cable facilities for the *limited purpose* of providing common carrier channel service to a *limited class* of users – franchised cable operators – via those facilities subject to section 214 certification. 47 C.F.R. § 63.55 provides that applications by telephone common carriers for authority to construct and/or operate distribution facilities for channel service to cable systems in their service areas shall include a showing that the applicant is unrelated and unaffiliated with the proposed cable operator.

III. COMMON CARRIERS CHOOSING TO LIMIT THE SCOPE OF THEIR SERVICES

- *In re Application of Tower Communication Systems Corporation*, 59 F.C.C. 2d 130 (1976).

Tower Communication Systems Corporation (“Tower”) applied for authority to establish and operate a communication channel through a domestic satellite “receive only” earth station. The receive-only earth station would be used for the reception of video signals of Home Box Office transmitted via RCA Global Communications Corporation’s domestic satellite system for distribution by Tower on a common carrier basis via terrestrial facilities. The FCC classified the facility as a common carrier, even though it was serving only its own affiliate, where the facility would not interfere with other common carriers.

- Telestra, Inc., Application for Authority Pursuant to Section 214 of the Communications Act of 1934, as amended, to Acquire Capacity in International Facilities for the Provision of Switched and Private Lines Services between the U.S. and Australia, *Memorandum Opinion, Order and Certificate*, 13 FCC Rcd 205 (1997).

Telestra, Inc. (“TI”) filed a request for authorization to acquire and operate facilities for the provision of switched and private lines service between the United States and Australia. The FCC granted TI’s request concluding that the grant of TI’s application for facilities-based switched and private-line service on the U.S.-Australia route was in the public interest. The FCC also determined that TI should be regulated as a common carrier. *See also* Application of IDC America, Inc.; Application Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Non-interconnected International Private Line Service Between the United States and Japan, *Order, Authorization, and Certificate*, File No. I-T-C-96-685, DA 97-571 (rel. March 21, 1997) (granting IDC America, Inc.’s (“IDC”) request for authority to resell non-interconnected international private lines between the United States and Japan. IDC was classified as a non-dominant carrier for that particular service.).

- Application of ITT World Communications Inc., for Temporary Authority, Pursuant to Section 214 of the Communications Act of 1934, as amended, to Provide Television Broadcasters a Television Earth Station via Early Bird Satellite, *Order and Authorization*, 3 F.C.C.2d 628 (1966).

ITT World Communications Inc. sought authority to provide television broadcasters a common carrier television transmission service via satellite through the use of the transportable earth station. *See also* IDB

Communications Group, LTD; Application to Modify its License for its Domestic Transmit/Receive Earth Station (E7754) at Culver City, California to Add the ANIK Satellite as a Point of Communication for Service between the U.S. and Canada, Order Authorization and Certificate, File No. 2805-DSE-MP/L-85 (rel. Feb. 14, 1986) (The FCC's order granted authority to several parties to permit communications with the Canadian ANIK satellites for the provision of audio and video transmission service between the U.S. and Canada).

- Consortium Communications International, Inc., Application for Authority to Acquire and Operate Facilities for the Provision of Telex Service between the U.S. and India, *Order, Authorization and Certificate*, 5 FCC Rcd 6562 (1990).

Consortium Communications International, Inc. ("CCI") filed a request for authority pursuant to Section 214 to acquire and operate facilities for direct telex service (and only telex service) between the U.S. and Japan. The FCC granted the request concluding that the "present and future public convenience and necessity require that provision of direct telex service to India by CCI." The FCC required CCI file a tariff for the proposed service in accordance with its Order.

- *Mobilefone of Northeastern Pennsylvania, Inc. v. The Professional Serv. Bureau of Luzerne County, Inc.*, 54 Pa. P.U.C. 161 (1980).

A group of persons offered a one-way paging service to physicians (and only physicians) in a small region of the state. The service was available to all physicians within the area that requested service. The Pennsylvania Public Utility Commission ("PA PUC") concluded that the one-way paging service offered to a limited portion of the public constituted a common carrier public utility service. Specifically, the PA PUC reasoned that "[w]hether a service is being offered 'for the public' and therefore properly classified as a public utility service, requires a determination whether or not such service is being held out, expressly or impliedly, to the general public as a class, or to *any limited portion of it*, as contradistinguished from being offered only to particular individuals."

- *State Bd. of R.R. Comm'rs v. Rosenstein*, 252 N.W. 251 (Iowa 1934).

An operator of a truck carrying theater films and advertising materials over a regular route to members of a film association was deemed a common carrier subject to statutory provisions. In making this determination, the Iowa Supreme Court concluded that to be classified as a common carrier, "it is not necessary . . . that he be required to carry goods for any description for every person offering the same. It is not necessary that he carry all kinds of goods, if he professes to carry only a certain kind, and, if so, this does not take from

him his status as a common carrier.” Indeed, as the court noted, “[i]f he held himself out as a common carrier of silks and laces, the common law would not compel him to be a common carrier or agricultural implements such as plows, harrows, etc.; if he held himself out as a common carrier of confectionery and spices, the common law would not compel him to be a common carrier of bacon, lard, and molasses.” (citing supporting case law from Kansas, California, Illinois, Indiana, Michigan and Oregon). Because the truck operator sought to offer his transportation service to all theaters in his territory he was a common carrier subject to the Iowa regulations.

- *In re United Parcel Serv.*, 256 A.2d 443 (Me. 1969).

The United Parcel Service (“UPS”), a corporation engaged in transportation of both interstate and intrastate items of limited size and weight, applied to the Public Utilities Commission (“PUC”) for authority to operate as a common carrier. The PUC granted the application, finding that UPS was a common carrier. The court affirmed the PUC’s holding, noting that “it is not essential to the status of one as a common carrier that he carry all kinds of property offered to him” Further, the court noted that “[w]e do not think, for example, that it is or could be seriously argued that a highway freight carrier would jeopardize its common carrier standing merely because it did not hold itself out to handle and could not in fact handle petroleum products, articles requiring refrigeration or heavy machinery.”

- *Neubauer v. Disneyland, Inc.*, 875 F. Supp. 672 (C.D. Cal. 1995).

The operator of an amusement park ride was a common carrier under a California statute, which broadly defines a common carrier as those who offer to the public to carry persons, property or messages. *See also McIntyre v. Smoke Tree Stables*, 205 Cal.App.2d 489 (Cal. Dist. Ct. App. 1995) (finding common carrier status in guided tour mule ride); *Squaw Valley Ski Corp. v. Superior Court*, 2 Cal.App. 4th 1499 (Cal. Dist. Ct. App. 1992), *reh'g denied*, 1992 Cal. App. LEXIS 266, 92 (Cal. Ct. App. 1992), *review denied*, 1992 Cal. LEXIS 1810 (Cal. 1992) (imposing common carrier status on chair lift carrying skiers although carriage is limited to skiers).